STATE OF MICHIGAN

COURT OF APPEALS

RONNY L. SCOTT, Personal Representative of the Estate of ROBERT JEFFERY SCOTT, Deceased,

Plaintiff-Appellant,

v

VILLAGE OF OXFORD, OXFORD POLICE DEPARTMENT,[1] OXFORD POLICE CHIEF, OXFORD POLICE SERGEANT, OXFORD POLICE OFFICER, and OXFORD POLICE DISPATCHER,

Defendants-Appellees.

UNPUBLISHED
April 20, 1999

No. 199622
Oakland Circuit Court
LC No. 95-499851 NO

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition. We affirm.

This case arises out of the unfortunate death of plaintiff's decedent, Robert Jeffery Scott, a pretrial detainee who committed suicide by hanging himself while in custody in the temporary lockup cell at the Oxford Police Department. The facts of this incident are essentially undisputed. On September 26, 1994, Scott was arrested for violating a restraining order filed against him by his estranged girlfriend. Scott was placed in the back seat of a police car and was transported to the Oxford Police Department. On the way to the station, Scott defecated in his pants. Upon their arrival at the police department, Scott attempted to flee, but was wrestled to the ground by an officer before he escaped. Scott was secured in leg cuffs and immediately placed in a lockup cell awaiting his transfer to the Oakland County Jail.

The lockup cell had a large window with mini-blinds, and was equipped with a video camera to assist dispatch officers in viewing the lockup area. The video camera, however, did not display a view of the entire cell. A few minutes after he was placed in the cell, Scott removed his pants and shirt and

sat on the bottom bunk bed. About fifteen minutes later, Scott cleaned himself off at the toilet and placed his shirt up around his shoulders, leaving it to hang loosely around his neck. Scott then laid down on the floor for about a half an hour and then headed toward the cell door, which was not visible on the camera. About ten minutes later, Officer Burnham looked in the cell and observed Scott hanging from the cell door bar by his tee-shirt. Attempts to resuscitate Scott were made prior to the arrival of EMS. Upon its arrival, EMS transported Scott to the hospital where he was placed on a ventilator. The ventilator was removed the following day and Scott was pronounced dead.

Plaintiff filed suit against the Village of Oxford, the Oxford Emergency Safety Authority (OESA) and four of its employees, Chief John LeRoy, Sergeant James Malcolm, Officer Stephen Burnham and Dispatcher Pat Marriott. In his complaint, plaintiff alleged a federal civil rights claim pursuant to 42 US 1983, a state law building defect claim, and state law claims for nuisance and negligence/gross negligence. Defendants filed a motion for summary disposition under MCR 2.116(C)(7), (8) and (10), asserting the defenses of governmental immunity, failure to state a claim upon which relief can be granted, and no genuine issue of material fact. The trial court granted the motion and dismissed all of plaintiff's claims.[2]

Although the trial court did not articulate the basis on which it granted summary disposition, because the court looked beyond the pleadings in granting defendants' motion, we review the court's decision pursuant to MCR 2.116(C)(10). When reviewing a motion for summary disposition based on MCR 2.116(C)(10), a court must review the documentary evidence and determine whether a genuine issue of material fact exists. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997). The court must draw all reasonable inferences in the nonmovant's favor, giving that party the benefit of any reasonable doubt. *Id.* Summary disposition is appropriate only if the court is satisfied that it is impossible for the nonmoving party to create a genuine issue of material fact as a matter of law. *Id.* This Court reviews the trial court's grant or denial of a motion for summary disposition de novo. *Id.*

Plaintiff first argues that the trial court erred in dismissing his federal civil rights claim brought pursuant to 42 USC 1983. We disagree. As plaintiff correctly observes, "a pretrial detainee's due process rights under the Fourteenth Amendment are protected to the same extent as the rights guaranteed convicted persons under the Eighth Amendment." *Jackson v Detroit*, 449 Mich 420, 430; 537 NW2d 151 (1995). However, a pretrial detainee does not have a constitutional right to be prevented from killing himself. Indeed, "an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'" *Estelle v Gamble*, 429 US 97, 105-106; 97 S Ct 285; 50 L Ed 2d 251 (1977). Claims based upon suicides committed in a jail are evaluated under the "deliberate indifference to a serious medical need" standard. *Id.* Thus, plaintiff cannot establish a constitutional due process violation absent a showing of "deliberate indifference," i.e., that the individual defendants acted with "deliberate indifference" to the decedent's health or safety. *Id.* at 104; *Farmer v Brennan*, 511 US 825, 834; 114 S Ct 1970; 128 L Ed 2d 811 (1994); *Jackson*, *supra* at 430.

In the context of this case, "deliberate indifference" describes "a state of mind more blameworthy than negligence." *Farmer*, *supra* at 835. This form of deliberate indifference mandates an inquiry into defendants' subjective state of mind. *Jackson*, *supra* at 430. Thus, plaintiff must prove

that the individual defendants were aware of facts from which an inference that a substantial risk of serious harm exists could be drawn, and must also prove that defendants, in fact, drew the inference. *Id*. at 431; *Farmer*, *supra* at 838-839. Although we acknowledge that the decedent's behavior was somewhat out of the ordinary, it was not inconsistent with that of an intoxicated person who is arrested and detained after a domestic dispute. Moreover, the fact that the decedent defecated in his clothing, while certainly an unpleasant experience, did not represent a threat of serious harm to his health or safety. Therefore, viewed in the light most favorable to plaintiff, we find that the facts presented do not establish that the individual defendants either objectively or subjectively knew that the decedent was a suicide risk, or was subject to a substantial risk of serious harm.[3] Accordingly, the trial court properly granted summary disposition of plaintiff's § 1983 claim to the individual defendants.

We also conclude that summary disposition was properly granted on the § 1983 claim against the municipal defendants. A governmental agency may only be found liable under § 1983 for a violation committed by an employee if the alleged injury was inflicted pursuant to a "policy or custom." *Monell v Dep't of Social Services of New York City*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978); *Jackson*, *supra* at 433. "Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights." *Bd of Co Comm'rs of Bryan Co v Brown*, 520 US 397; 117 S Ct 1382, 1393; 137 L Ed 2d 626 (1997). "A showing of simple or even heightened negligence will not suffice." *Id*.

Here, the evidence established, at most, simple negligence. The decision not to install safety glazing in the holding cell and to place mini-blinds on the window in the dispatch room did not constitute a "custom or policy" of indifference to prisoners' needs. Thus, summary disposition of plaintiff's § 1983 claim against the village and police department was proper.

Next, plaintiff argues that the trial court erred in granting summary disposition to defendants on his state law claim grounded in the public building exception to governmental immunity. We disagree. As a general matter, a governmental agency is immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); MSA 3.996(107)(1). An exception to this broad grant of immunity is the "public building" exception, MCL 691.1406; MSA 3.996(106).

In discussing the public building exception in the context of jailhouse suicides, our Supreme Court in *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 425-426; 487 NW2d 106 (1992), stated that the determination whether a jail cell is dangerous or defective "must be determined in light of the uses or activities for which it is specifically assigned" and concluded that a cell "specifically intended and assigned for temporary detention" was not defective. See also *Jackson*, *supra* at 429. Contrary to plaintiff's contention, this principle has not been abrogated by the Supreme Court's more recent decision in *DeSanchez v Dep't of Mental Health*, 455 Mich 83; 565 NW2d 358 (1997). In *DeSanchez*, the Supreme Court expressly stated that it was *not* considering the issue whether a defect existed in the building. *Id.* at 85, n 1. Rather, the Court merely held that "the defense that proper supervision would have prevented the injury does not negate the allegation of a true building defect so as to permit the conclusion that there is no question of material fact regarding the existence of a defect." *Id*. at 97.

Here, just as in *Hickey*, the trial court found that the holding cell at issue was specifically intended and assigned for temporary detention. Furthermore, we believe that this case is similar to *Johnson v Detroit*, 457 Mich 695, 710; 579 NW2d 895 (1998), which also involved a jailhouse suicide in a police station holding cell. The Court in *Johnson* observed that "[e]stablishing a building-defect claim circumventing immunity does not negate traditional tort law principles," and it held that summary disposition under MCR 2.116(C)(10) was proper where the facts showed that "defendants were actually unaware, and it was not reasonably foreseeable, that the decedent was suicidal before placing him in the defective cell." *Johnson, supra* at 710-711.

In this case, the facts showed that the holding cell in question was intended and designed as a temporary facility, and that it was not reasonably foreseeable that the decedent was suicidal. Accordingly, summary disposition under MCR 2.116(C)(10) was proper.

Finally, plaintiff argues that the trial court erred in granting summary disposition to the individual defendants of his state law negligence claim on the basis of governmental immunity. We disagree. MCL 691.1407(2); MSA 3.996(107)(2) provides that governmental employees are immune from tort liability if they are acting within the scope of their authority, are engaged in the discharge of a governmental function and their conduct "does not amount to gross negligence that is the proximate cause of the injury or damage." The statute defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

Plaintiff argues that summary disposition was improper because there were genuine issues of material fact regarding whether the defendant police officers were grossly negligent.[4] Summary disposition is precluded in cases in which reasonable jurors honestly could have reached different conclusions with regard to whether the defendants' conduct amounted to gross negligence. *Harris v Univ of Michigan Regents*, 219 Mich App 679, 694; 558 NW2d 225 (1996). In this case, however, we agree with the trial court that plaintiff failed to present evidence from which reasonable jurors could conclude that the individual defendants were grossly negligent. Accordingly, summary disposition pursuant to MCR 2.116(C)(7) and (10) was proper.

Affirmed.

/s/ Roman S. Gribbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder

[1] Plaintiff was granted leave to amend his complaint to change "Oxford Police Department" to "Oxford Emergency Safety Authority;" however, the original name still appears in plaintiff's appeal pleadings.

[2] On appeal, plaintiff does not challenge the trial court's dismissal of his nuisance claim.

[3] Plaintiff also argues that defendants should be charged with the knowledge that Scott had previously threatened or attempted suicide. However, the record establishes that Scott's previous suicide threat occurred almost a year before this particular incident, and the circumstances of that incident were entirely different than those presented here. Therefore, we find that the connection between the incidents is too remote to impose liability on this basis.

[4] On appeal, plaintiff does not challenge the trial court's determination that Police Chief LeRoy was immune from liability under MCL 691.1407(5); MSA 3.996(107)(5), as the highest appointive executive official of the Police Department acting within the scope of his executive authority.